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What is Equality? The Winding Course of Judicial Interpretation

Peter W. Hogg[*]

I. PURPOSE OF PAPER

The *Canadian Charter of Rights and Freedoms* (the "Charter") came into force on April 17, 1982. However, the coming into force of section 15 of the Charter was postponed for three years to provide time for each government to review its body of legislation and make amendments to bring the laws into conformity with equality. Section 15 therefore came into force in 1985, which makes April 17, 2005 its 20th anniversary. The purpose of this paper is to describe the 20-year history of section 15 in the Supreme Court of Canada.

A related guarantee of equality is section 28 of the Charter, which provides that the rights and freedoms referred to in the Charter "are guaranteed equally to male and female persons." This provision (which has a counterpart in section 35(4), the aboriginal-rights guarantee) has rarely been referred to in the cases. Even in the case of gender equality, the courts have assumed that all the work is done by section 15.

Another related guarantee is section 27, which provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This has also rarely been referred to, and has never played an important role in a decision.

II. THE "EMPTY IDEA" OF EQUALITY

A guarantee of equality cannot mean that laws must treat everyone equally. No law does that. The *Criminal Code* imposes punishments on those convicted of crime; no similar burden is imposed on the innocent.

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Education Acts require children to attend school; no similar obligation is placed on adults. Persons over 65 are entitled to public pensions; persons under 65 are not. Manufacturers of food and drugs are subject to more stringent regulation than manufacturers of automobile parts. Every law employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Obviously, only those classifications that are unfair in some way would violate a guarantee of equality. But which are they?

The straightforward definition of equality, based on Aristotle's account, is that like persons should be treated alike, and unlike persons should be treated differently in proportion to the difference between them. The fundamental difficulty with this account is not that it is wrong (as is often claimed) but that it is stated at too high a level of generality to be useful. It provides no criteria to determine when a person is "like" another, or even who should be compared to whom, and it provides no criteria to assess the appropriateness of different treatments of those who are not alike. Furthermore, the criteria cannot really be found in the idea of equality by itself. The question of who should be punished by the criminal law and what the appropriate punishment should be is a question of criminal justice. Similarly, questions about the fairness of entitlements or obligations to public education, public pensions, regulatory oversight, and so on, are difficult issues of public policy that are not going to be answered by an abstract notion of equality. This has led commentators to describe equality as an "empty idea".[1] It is empty in the sense that it cannot be applied without first working out the criteria of likeness and like treatment, and the idea of equality cannot by itself supply those criteria.

The most common criticism of the Aristotelian idea of equality is not that it is empty, but that it can mask discrimination that occurs indirectly rather than directly. An apparently neutral law may have a disproportionate effect on a particular group, which will claim that it has been treated unequally. A law that prohibits women from serving in the police forces would directly discriminate against women. A law framed in gender-neutral language that prohibits persons under six feet in height from serving in the police forces would have the indirect effect of discriminating against women, because their generally lower height will

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[1] Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537.

cause them, disproportionately, to fail to meet the recruitment standard. Everyone agrees that a theory of equality must cover the indirect as well as the direct case.

It has never been clear to me that the Aristotelian idea of equality was incapable of recognizing the indirect case. After all, the claim of the equality-seeking group is that unlike cases are being treated alike by the apparently neutral law. In any event, the conventional wisdom is that "formal equality" (which is what is attributed to Aristotle) is "trivial, even insulting",[2] because it does not capture indirect discrimination. Robert Wintemute, writing about discrimination on the ground of sexual orientation, challenges the conventional wisdom. He points out that "formal legal equality has tremendous material and symbolic value, which only those who have been denied it for many years can fully appreciate."[3] But, as Wintemute acknowledges, formal equality is not enough. It is also necessary to guarantee "substantive equality", meaning by that term a theory of equality that will capture indirect as well as direct discrimination. Even when one moves from formal equality (prohibiting direct discrimination) to substantive equality (prohibiting indirect as well as direct discrimination),[4] one is still left with the problem that the idea of equality does not by itself supply the criteria for determining which distinctions (whether they be direct or indirect) are consistent with the idea of equality and which are not.

In the paper that follows, I trace the "winding course" of judicial interpretation of section 15.[5] The Supreme Court of Canada has changed the ground rules every few years as the judges have journeyed along that winding course. It has been a serious problem for any commentator foolish enough to try and keep a treatise on constitutional law up to date.

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[2] Robert Wintemute, "Sexual Orientation and the Charter" (2004) 49 McGill L.J. 1143 at 1180.

[3] *Id.*

[4] I should note that academics are not agreed on precisely what is the difference between formal and substantive equality: for discussion, see Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299; Bruce Ryder, Cidalia C. Faria, Emily Lawrence, "What's *Law* Good For: An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103 at 105-108.

[5] The same path has been traced by J. Hendry, "The Idea of Equality in Section 15 and its Development" (2002) 21 Windsor Y.B. Access to Justice 153; Debra M. McAllister, "Section 15—The Unpredictability of the *Law* Test" (2003) 15 N.J.C.L. 35; Ryder *et al.*, previous note. I am indebted to all three accounts. I have also relied on my own account of equality: Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Thomson Carswell), at c. 52.

But it is well to remember the emptiness of the idea that section 15 constitutionalizes. It is not easy to apply a guarantee of equality.

III. EQUALITY BEFORE THE CHARTER

When section 15 came into force, Canadian courts were not entirely unprepared to apply a guarantee of equality. The *Canadian Bill of Rights*, which was a statutory bill of rights, and which applied only to federal laws, contained a guarantee of "equality before the law". In *R. v. Drybones* (1969),[6] a majority of the Supreme Court of Canada held that the *Indian Act* offence of being intoxicated off a reserve, because it applied only to "Indians", was invalid for conflict with the equality guarantee of the Bill. In later cases, however, the Court decided that, if a federal law pursued a "valid federal objective", then its provisions could not be attacked on equality grounds. This highly deferential approach left *Drybones* as the only example of a conflict with the equality guarantee of the Bill.[7] These cases were generally regarded as unsophisticated and unduly deferential to Parliament, and did not provide good models for a new jurisprudence under a constitutional bill of rights. Moreover, much of the phraseology of section 15 (accounting for its verbose language) was specifically designed to negate various poorly considered rulings under the Bill.[8]

The other body of law of which Canadian courts were aware (at least dimly) was the jurisprudence under the Fourteenth Amendment of the American Bill of Rights. The Fourteenth Amendment, which was adopted after the Civil War and the emancipation of the slaves, included a guarantee of the "equal protection of the laws". The American courts had developed a doctrine of reasonable classification, under which a law that drew a distinction that was reasonable in light of a legitimate purpose satisfied the guarantee. The Supreme Court of the United States normally struck down racial classifications under this doctrine, *Brown v. Board of Education* (1954)[9] being the most famous example. But the doctrine of reasonable classification was far from clear, and the "strict scrutiny" that the Court applied to racial classifications was moderated

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6 [1970] S.C.R. 282.

7 Hogg, *supra*, note 5, at sec. 52.2.

8 *Id.*, at sec. 52.6(a).

9 347 U.S. 483 (1954).

for other classifications, yielding a jurisprudence that did not give equal protection very much work to do.[10] As well, the history of slavery in the United States culminating in the Civil War, and the persistence after emancipation of official discrimination against African Americans, provided a unique context for the Fourteenth Amendment.

IV. EQUALITY BEFORE *ANDREWS*

As related above, the Charter of Rights was adopted in 1982, and it included section 15, although that particular guarantee did not come into force until 1985. Section 15 provides:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The four different ways of describing equality ("equal before", "equal under", "equal protection" and "equal benefit") in section 15 are explained by earlier decisions under the *Canadian Bill of Rights*. In practice, nothing has turned on these various formulations, and they will not be pursued in this paper. Nor has section 15(2) been given any independent force, since it has consistently been treated as a clarification of the guarantee of substantive equality in section 15(1).[11]

What is actually prohibited by section 15 is "discrimination" and, "in particular" discrimination "based on" the listed grounds of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". The words "in particular" made clear that the listed grounds were not exhaustive. Did that mean that every legislative classification

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[10] Hogg, *supra*, note 5, at sec. 52.3.

[11] *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2001] 1 S.C.R. 950 at para. 93, assembles the citations.

was potentially reviewable under section 15? At first, Canadian courts answered "yes", and Canadian lawyers rose to the challenge. Every law could be attacked under section 15! The volume of cases was truly disturbing. A study prepared in 1988,[12] only three years after the coming into force of section 15, found 591 judicial decisions (two-thirds of which were reported in full) in which a law had been challenged under section 15. Most of the challenges seemed unmeritorious, and most of the challenges were unsuccessful. But the absence of any clear standards for the application of section 15 encouraged lawyers to keep trying to use section 15 whenever a statutory distinction worked to the disadvantage of a client.

On the assumption that section 15 could potentially cover all legislative classifications, how did one determine which classifications were in breach of the Charter? A variety of theories were proposed by courts and commentators to answer that question. At one extreme, was the theory, espoused by me in the second edition of my text,[13] that every distinction drawn in a statute counted as discrimination in breach of section 15. The question whether it was justified or not would then have to be determined under section 1. On this theory, the structure of analysis developed in *R. v. Oakes* (1986)[14] for justification under section 1 (sufficiently important objective, rational connection to that objective, minimum impairment and proportionality) would be the analysis that would be applied to all section 15 challenges. The analogy was freedom of expression, which is guaranteed by section 2(*b*) of the Charter; the Supreme Court has defined "expression" so broadly that freedom of expression cases are in practice all decided under section 1.

At the other end of the spectrum was the position taken by McLachlin J. (now the Chief Justice of Canada) when she was a judge of the British Columbia Court of Appeal. In the *Andrews* case (1986),[15] which eventually went on to the Supreme Court of Canada, she held that the only legislative distinctions that would amount to discrimination were those that were "unreasonable or unfair". On this theory, section

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[12] Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women* (Can. Advisory Council on the Status of Women, Ottawa, 1989), at 277.

[13] Peter W. Hogg, *Constitutional Law of Canada*, 2d ed., (1985), at 799-801.

[14] [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103.

[15] *Andrews v. Law Society of British Columbia*, [1986] B.C.J No. 338, 27 D.L.R. (4th) 600, at 610 (C.A.).

15 contained its own implicit requirement of justification, and the question whether a legislative distinction was justified or not would be determined by an assessment of its reasonableness or unfairness according to standards that the courts would have to develop within section 15 itself. Presumably, section 1 would play no role in section 15 cases since section 1 justifies only "reasonable" limits on Charter rights. The analogy was "unreasonable search and seizure", which is prohibited by section 8 of the Charter; the justificatory principle for search and seizure provisions is embedded in section 8 itself.

V. The Requirement of Listed or Analogous Grounds

It was the theory that section 15 covered all legislative classifications that opened the floodgates to equality challenges. Whether justification was to be found in section 1 or within section 15 itself was not likely to make much difference to the volume of cases coming before the courts. What was needed was some threshold barrier that would reduce the flow of cases to those where legislative distinctions were presumptively suspect, and where judicial intervention was less likely to disturb legitimate legislative line-drawing. In fact, section 15 did contain some clues to its scope that were missing from its counterparts in the *Canadian Bill of Rights* and the Fourteenth Amendment. The listed grounds, although admittedly not exhaustive, did point to personal characteristics of individuals that cannot easily be changed and which have often been the target of prejudice or stereotyping. The reference in subsection (2) (the affirmative action clause) to "disadvantaged individuals or groups" suggested that the role of section 15 was to correct discrimination against disadvantaged individuals or groups. These features of section 15 suggested that the proper role of section 15 was not to eliminate all unfairness from our laws, let alone all classifications that could not be rationally defended, but rather to eliminate discrimination based on immutable personal characteristics.

Andrews v. Law Society of British Columbia (1989)[16] was the first section 15 case to reach the Supreme Court of Canada. It was a challenge to the statutory requirement of the province of British Columbia that members of the bar had to be citizens of Canada. The Court held

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[16] [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.

unanimously that this requirement was contrary to section 15, and by a majority that it was not saved by section 1. Justice McIntyre wrote for the unanimous Court on the interpretation of section 15 (although he ended up dissenting, because he thought the law should be upheld under section 1). Justice McIntyre discussed and rejected the theories advanced by me (that section 15 condemned all legislative classifications) and by McLachlin J. (that section 15 condemned unreasonable or unfair classifications). He held that there was a "middle ground" between those two positions, which was to interpret "discrimination" in section 15 as applying to only the grounds listed in section 15 and "analogous" grounds. This "enumerated and analogous grounds approach", he said, "most closely accords with the purposes of s. 15", and "leaves questions of justification to s. 1".[17] The Court went on to hold (with surprisingly little discussion) that citizenship qualified as an analogous ground of discrimination.

After *Andrews*, it was clear that section 15 was a prohibition of discrimination, and that discrimination was the imposition of a disadvantage (the imposition of a burden or the denial of a benefit)[18] on an individual by reason of the individual's possession of a characteristic listed in section 15 or analogous to those listed in section 15. This immediately ruled out judicial review of all statutes that did not employ a listed or analogous classification. This was a severe reduction in the scope of section 15, but one that could certainly be supported by the text of the section. After *Andrews*, only L'Heureux-Dubé J., for a time, refused to accept the new doctrine. She advocated a more discretionary, case-by-case, assessment of whether discrimination existed.[19] No other judge agreed with her, and she rejoined the other members of the Court in *Law v. Canada (Minister of Employment and Immigration)* (1999),[20] in which the Court unanimously reaffirmed the restriction of section 15 to listed and analogous grounds. The Court in *Law* also added a new

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[17] *Id.*, at 182.

[18] In the world of equality, few matters are straightforward. The question of whether a claimant has truly suffered a disadvantage is often difficult to determine, and the question of to whom the claimant should be compared in order to determine disadvantage is also often difficult to determine. These side issues will not be explored in this paper, although they have frequently required Supreme Court rulings. They are addressed in Hogg, *supra*, note 5, at c. 52.

[19] *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418, at para. 90; *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513, at para. 89.

[20] [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

restriction, namely, that discrimination involved an impairment of "human dignity". That element of section 15 is discussed later in this article. For present purposes, I simply note that the restriction to listed and analogous grounds has persisted to the present day and is obviously a permanent feature of the section 15 exegesis.

VI. The Addition of Analogous Grounds

Although the restriction to listed and analogous grounds was a severe reduction in the scope of section 15, it did leave room for analogous grounds to be enrolled as bases for findings of discrimination. What are "analogous" grounds? Obviously, they are grounds that are similar in some important way to the grounds listed in section 15, which are "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". These are all personal characteristics of individuals that are unchangeable (or immutable), or at least unchangeable by the individual except with great difficulty or cost. What is objectionable about using such characteristics as legislative distinctions is that consequences should normally follow what people do rather than what they are. It is not normally acceptable to impose a disadvantage on a person by reason of a characteristic that is outside the person's control. The function of section 15 is to provide for judicial review of legislative distinctions of that kind.

In *Andrews* itself, although the Court was unanimous that *citizenship* was an analogous ground, only La Forest J. attempted to grapple with a definition. He pointed out that citizenship was a personal characteristic that is "typically not within the control of the individual and, in this sense, is immutable."[21] This ruling was affirmed in *Lavoie v. Canada* (2002),[22] where the issue was the validity of a statutory hiring preference for citizens in the federal public service. A majority of the Court, which divided on issues of human dignity and section 1, upheld the preference, but all members of the Court agreed that citizenship was an analogous ground.

The second analogous ground to be recognized was *marital status*. The recognition started in *Miron v. Trudel* (1995), which concerned the

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21 *Supra*, note 16, at 195.

22 [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769.

statutory provision of accident benefits to a "spouse", which was defined as a person legally married to the victim. Although the claimant common-law spouse succeeded in striking down the requirement of legal marriage, only four judges actually held that marital status was an analogous ground. Four judges held that it was not. The fifth member of the majority (L'Heureux Dubé J.) held that it did not matter.[23] This was less than a ringing endorsement of marital status as an analogous ground, but, in *Nova Scotia (Attorney General) v. Walsh* (2002),[24] the Court (which included two of the judges who had dissented in *Miron v. Trudel*) was unanimous that marital status was an analogous ground. However, the majority of the Court held that the matrimonial property regime of Nova Scotia, which was restricted to persons legally married, did not breach section 15, because it did not impair the human dignity of the common-law spouses despite their exclusion by reason of their marital status.

It is worth interpolating here that neither citizenship nor marital status has a strong claim to be an analogous ground, because neither is immutable in any strong sense. Each is a status that can often be chosen by the individual, although (as the Court has rightly emphasized) that choice is sometimes blocked by legal requirements or (in the case of marital status) by the contrary wish of another person. Indeed, the element of choice has been important in persuading the Court to uphold legislative distinctions based on citizenship[25] and marital status.[26] It is not surprising to find the requirement of dignity or the requirements of section 1 defeating constitutional challenges based on either of these analogous grounds.

The third analogous ground to be recognized was *sexual orientation*. In *Egan v. Canada* (1995),[27] eight of nine judges decided that sexual orientation was an analogous ground. Justice La Forest, writing for himself and three others, described sexual orientation as "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."[28] For complicated reasons, the claimants, a

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23 *Supra*, note 19.
24 [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325.
25 *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769.
26 *Nova Scotia v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325.
27 [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513.
28 *Id.*, at para. 5.

same-sex couple who were seeking a spousal allowance under the federal Old Age Security program, did not actually succeed. But the ruling on analogous grounds was clear enough, and it paved the way for a series of cases that confirmed the ruling and upheld the equality rights of homosexual claimants. In *Vriend v. Alberta* (1998),[29] the Court held that Alberta's human rights code violated section 15 by failing to include sexual orientation as a prohibited ground of discrimination. In *M. v. H.* (1999),[30] the Court held that Ontario's family law legislation violated section 15 by excluding same-sex couples from spousal support obligations. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000),[31] the Court held that the practices of customs officials in obstructing the importation of books by a bookstore catering to gay and lesbian communities was a breach of section 15. The Courts of Appeal of British Columbia and Ontario and other provincial courts have held that the opposite-sex requirement for marriage is contrary to section 15, thereby legalizing same-sex marriage in several provinces.[32] These decisions also helped the Supreme Court to decide that the federal power over "marriage" extended to same-sex marriage,[33] a ruling which was followed by legislation enacting a new national definition of marriage that no longer requires the couple to be of opposite sex.[34]

So far, these three grounds are the only ones that have been recognized. *Place of residence* has not been accepted as an analogous ground,[35] except in the special case of residence on an Indian reserve.[36] Nor is *occupation* an analogous ground, so that a law denying collective bargaining rights to police officers cannot be challenged under section

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29 [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493.

30 [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3.

31 [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120.

32 *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, 225 D.L.R. (4th) 472 (C.A.); *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 225 D.L.R. (4th) 529 (C.A.).

33 *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698.

34 *Civil Marriage Act*, S.C. 2005, c. 33.

35 *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296.

36 *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203.

15.[37] And privileges for the Crown in litigation cannot be challenged, because there is no distinction based on an analogous ground.[38]

Where there is no distinction based on an analogous ground, there is no remedy under section 15. The Court, which of course created this restriction, has chafed against it in some cases where the Court wanted to grant a remedy. Malapportioned voting districts, which give rural votes more weight than urban votes, have been held to be unconstitutional under the right to vote in section 3 of the Charter.[39] This decision allows place of residence to be a ground of unconstitutional discrimination where voting rights are involved. The exclusion of agricultural workers from Ontario's labour relations legislation has been held to be unconstitutional under the right to freedom of association in section 2(d) of the Charter.[40] This decision allows occupation to be a ground of unconstitutional discrimination where freedom of association is involved. When the Court imports equality values into other Charter rights,[41] it leaves out the restriction to listed and analogous grounds! (And it also leaves out the requirement of an impairment of human dignity.)

VII. Recognition of Substantive Equality

Justice McIntyre in *Andrews* made clear that section 15 required substantive and not merely formal equality. He rejected the "similarly situated" test, which was the way in which formal equality had been expressed in the past, pointing out that "identical treatment may frequently produce serious inequality."[42] He acknowledged that equality is a "comparative concept", and the key to its application under section 15 was the prohibition of "discrimination". He referred to cases under the human rights codes and to the Abella report on equality in employment to conclude that indirect (or systemic) inequality was covered along

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[37] *Deslisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989.

[38] *Rudolf Wolff & Co. v. Canada*, [1990] S.C.J. No. 28, [1990] 1 S.C.R. 695.

[39] *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158.

[40] *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016.

[41] See Peter W. Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 S.C.L.R. (2d) 113.

[42] *Supra*, note 16, at 164.

with direct inequality.[43] Substantive equality—meaning that indirect as well as direct discrimination was prohibited—has been a central assumption of the interpretation of section 15 to the present day.

The recognition of substantive equality has enormous symbolic significance for equality-seeking groups, such as women or visible minorities, who have generally achieved formal equality. It allows a court to drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic. It is not necessary to show that the law was passed with the intention of discriminating; the mere fact that the law does have the disproportionately adverse effect is enough. Despite the commitment of the Supreme Court of Canada to substantive equality, and despite the industry of women's groups and other equality-seeking groups in developing equality cases for litigation, only two claims of indirect discrimination have been successful.[44] One is *Eldridge v. British Columbia (Attorney General)* (1997),[45] where the challenge was to the failure of British Columbia's statutory health care plan to provide publicly-funded sign-language interpretation to deaf persons seeking medical services. British Columbia's law was neutral in that all persons were denied sign-language interpretation, but of course the denial only disadvantaged deaf people. The Court held that the law discriminated against deaf people in breach of section 15. The other is *Vriend v. Alberta* (1998),[46] where the challenge was to the failure of Alberta's human rights legislation to include sexual orientation in the list of forbidden grounds of discrimination in employment. Alberta's law was neutral in that the denial of a remedy applied equally to those of heterosexual orientation[47] as well as to those of homosexual orientation. However, the disproportionate impact of the law was so obvious that the Court held that it discriminated against those of homosexual orientation in breach of section 15.

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[43] *Id.*, at 173-74.

[44] Unsuccessful claims of indirect discrimination are *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (prohibition on assisted suicide not discrimination on the basis of physical disability); *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (disallowance of child care costs as business expenses for income tax purposes not discrimination on the basis of sex). Each of these cases divided the Court. However, the total number of indirect discrimination claims reaching the Court is surprisingly small.

[45] [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

[46] *Supra*, note 29.

[47] Discrimination on the ground of heterosexuality is rare, but not unknown, for example, in the "gay kitchen" of a restaurant.

VIII. THE AMBIGUITY IN *ANDREWS'* DEFINITION OF DISCRIMINATION

My reading of *Andrews* was that a breach of section 15 occurred whenever a disadvantage (a burden or withheld benefit) was imposed on the basis of a listed or analogous ground. That finding would exhaust the role of section 15, and issues of the reasonableness or fairness of the challenged law would be addressed under section 1. This elegant and simple approach accorded appropriately distinct roles for section 15 and section 1 in the equality inquiry. And who could doubt that the *Oakes* principles of justification, so carefully developed to determine justification for breaches of all the other guarantees of the Charter, were just as suitable to determine whether a classification based on a listed or analogous ground should be upheld?

This reading of *Andrews* meant that "discrimination" in section 15 had a very simple meaning. It meant the imposition of a disadvantage or withholding of a benefit on the basis of a listed or analogous ground. However, when I go back to *Andrews* to try and understand why this understanding has not persisted in the later cases, I find that there is a passage in McIntyre J.'s opinion that introduces a serious element of uncertainty as to what he actually meant. After restricting the operation of section 15 to listed and analogous grounds, he says that:[48]

> However, in assessing whether a complainant's rights have been infringed under s. 15(1), it *is not enough* to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, *in addition*, must show that the legislative impact of the law is discriminatory.

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[48] *Supra*, note 16, at 182 (emphasis added).

This difficult passage certainly leaves the impression that something more than the breach of a listed or analogous ground is required to constitute discrimination under section 15. But it is accompanied by no hint as to what that something more might be, other than the vague suggestion that it has to do with the "effect" or "impact" of the law.

The passage that I have quoted is then followed by McIntyre J.'s ruling as to the relationship between section 15 and section 1:[49]

> Where discrimination is found a breach of s. 15(1) has occurred and—where s. 15(2) is not applicable—any justification, any consideration of the reasonableness of the enactment; indeed any consideration of factors that could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1.

This passage makes clear that considerations of reasonableness or other justificatory factors would be addressed under section 1. The implication is that such matters are not part of the definition of discrimination in section 15, because, if they are, the clear demarcation between the roles of section 15 and section 1 is destroyed.

My only point in picking away at McIntyre J.'s opinion in *Andrews* is to show that there is some ambiguity and uncertainty as to whether he intended his "enumerated and analogous grounds" approach to exhaust the elements of "discrimination" in section 15. If discrimination is taken to include other elements, then the meaning of section 15 becomes quite unclear, and the respective roles of section 15 and section 1 become confused. If, on the other hand, discrimination is taken to mean simply a breach of a listed or analogous ground, then the meaning of section 15 is clear, and the respective roles of section 15 and section 1 are also clear. In the subsequent cases, these two views warred for supremacy, and unfortunately the wrong side won.

In the *Miron* and *Egan* cases, decided in 1995, four of the nine judges wanted to import into the section 15 analysis (through the definition of discrimination) the requirement that the legislative classification not only be based on a listed or analogous ground, but also be "irrele-

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[49] *Id.*

vant" to "the functional values of the legislation."[50] If the legislative classification was relevant, then there was no discrimination. If there was no discrimination, there was no breach of section 15, and no requirement for the government to justify under section 1 its use of a listed or analogous ground as the basis for the imposition of a disadvantage. One can readily agree that the relevance of a legislative distinction to a legitimate legislative purpose is important in assessing whether the distinction is justified or not. But an inquiry into relevance would essentially duplicate the *Oakes* tests for section 1 justification.[51] Of the five other judges in *Miron* and *Egan*, four followed the orthodox route of ignoring the ambiguity in *Andrews*. They held that a disadvantage imposed on the basis of an analogous ground (marital status in *Miron*, sexual orientation in *Egan*) was enough to constitute discrimination, and immediately moved on to section 1 justification. One judge, L'Heureux-Dubé J., took a different path entirely, rejecting the restriction of section 15 to listed and analogous grounds, and investigating discrimination on a broader, more discretionary, case-by-case basis.

After *Miron* and *Egan*, which were decided in 1995, the Court was splintered into three camps as to the interpretation of section 15. This did not stop them from deciding some section 15 cases unanimously. In *Eaton*,[52] *Benner*,[53] *Eldridge*[54] and *Vriend*,[55] decided between 1996 and 1998, the Court reached unanimous decisions,[56] but made no attempt to resolve the differences among the judges. It was not necessary, they claimed,[57] because in each case all three interpretations of section 15 would have led to the same result.

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[50] *Supra*, note 19, at para. 15 *per* Gonthier J. dissenting (with the agreement of Lamer C.J.C., La Forest and Major JJ.); *supra*, at para. 13 *per* La Forest J. concurring (with the agreement of Lamer C.J., Gonthier and Major JJ.).

[51] In *Miron v. Trudel*, *id.*, at paras. 31-38, Gonthier J. argues that the requirement of irrelevance in s. 15 would still leave s. 1 with some work to do. The argument depends on the point that the "functional values" of the legislation are not the same as the objective of the legislation. This is a highly refined distinction.

[52] *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241, paras. 62-65.

[53] *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358, at paras. 60-68.

[54] *Supra*, note 45, at paras. 58-59.

[55] *Supra*, note 26, at paras. 70-74.

[56] In *Vriend*, *id.*, Major J. dissented, but only on the issue of remedy, not s. 15.

[57] In the previous notes, I have identified the passages where this claim is made.

IX. The Requirement of an Impairment of Human Dignity

In *Law v. Canada* (1999),[58] the Supreme Court of Canada surprised observers by issuing a unanimous opinion, written by Iacobucci J., that provided a new interpretation of section 15. The new interpretation differed from each of the three of the competing interpretations that had been offered in *Miron* and *Egan*. The new consensus was as follows:

(1) Section 15 applied only to legislative distinctions based on a listed or analogous ground (contrary to L'Heureux-Dubé J.'s earlier view).

(2) Discrimination in section 15 involved an element additional to a distinction based on a listed or analogous ground (contrary to four judges' earlier view).

(3) That additional element was an impairment of "human dignity"[59] (contrary to all nine judges' earlier view).

The new requirement of an impairment of human dignity defeated the claimant in *Law*. Under the federal Canada Pension Plan, survivors' benefits were payable to the spouses of deceased contributors, unless the spouse was under the age of 35, in which case the spouse was not entitled to survivors' benefits. The claimant in *Law* was the survivor of a deceased contributor, but, because she was under the age of 35, she was ineligible for a survivor's benefit. The law withheld a benefit from her on the ground of her age, age being a listed ground under section 15. On the simple interpretation of *Andrews*, that should have sent the issue on to section 1, where the government would be required to satisfy the Court that the age-based distinction was justified under the standards established in *Oakes*. But, by adding the new requirement of human dignity to section 15, the Court imposed on the claimant the burden of establishing that the age-based distinction was an impairment of her human dignity. She was unable to discharge that burden, and so her equality claim was denied without recourse to section 1.

Why was the age-based distinction in *Law* not an impairment of human dignity? The Court's answer was that, in the context of the Canada Pension Plan's purpose, it recognized the reality that young widows

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[58] *Supra*, note 20.

[59] *Id.*, at para. 88.

and widowers would have less difficulty than older persons in finding and maintaining employment after the death of a spouse, and would in the long term be able to replace the lost income of the deceased spouse. This is very close to saying that the age-based distinction was a reasonable restriction on access to CPP benefits. And yet, if one point was clearly enunciated by McIntyre J. in *Andrews*, it was that, once discrimination was found under section 15, issues of reasonableness should be left to section 1.[60] This ruling would be nonsensical if only unreasonable distinctions qualified as discrimination under section 15.

Justice Iacobucci in *Law* did not define "human dignity". What he did do was to suggest[61] four "contextual factors" (which were not to be taken as exhaustive) that were helpful to the inquiry. The factors were: (1) the existence of pre-existing disadvantage; (2) any correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects on other groups; and (4) the nature of the interest affected. In *Law* itself, it was the second ("correspondence") factor that was important. The age qualification for CPP survivor benefits corresponded to the actual characteristics and circumstances of youthful surviving spouses, who could more readily find or maintain employment than older surviving spouses.

Since 1999, every case has followed the *Law* analysis, and looked for an impairment of human dignity. *Law* has supplanted *Andrews* as the leading case on section 15. This is unfortunate. The element of human dignity that is now apparently firmly embedded in the jurisprudence is vague, confusing and burdensome to equality claimants.[62]

Human dignity is *vague*. In the cases following *Law*, the Court has often disagreed with lower courts and disagreed among itself on the question whether the challenged law impairs the human dignity of the

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[60] *Supra*, note 49.

[61] *Supra*, note 20, at para. 88.

[62] Commentators have been nearly unanimous in their criticism of the new element: *e.g.*, Bev Baines, "*Law v. Canada*: Formatting Equality" (2000) 11 Const. Forum 65; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299, at 319-32; June Ross, "A Flawed Synthesis of the *Law*" (2000) 11 Const. Forum 74; Christopher Bredt and Adam Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for S. 15" (2003) 20 S.C.L.R. (2d) 33; Hogg, *supra*, note 5, at sec. 52.7(b); Debra M. McAllister, note 5, above, 105-106. Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299, 315, agrees that there should be a third element to s. 15, but that it should be "protecting the interest in belonging" rather than human dignity.

claimant.[63] As Debra McAllister has concluded (after a careful analysis of the opinions on human dignity), the disagreements cannot be said to be simply "a case of reasonable people disagreeing on the application of a legal test"; rather, the disagreements show that the test has "very little substance".[64] Considering that the validity of legislation turns on the application of the test, this is a very serious criticism.

Human dignity is *confusing.* As an element of section 15, it is a reversion to the idea that was rejected in *Andrews*, namely, that section 15 should be restricted to unreasonable or unfair distinctions. As McIntyre J. pointed out in *Andrews*, by introducing this kind of evaluative step into section 15, the relationship between section 15 and section 1 is confused, and it is not clear how much work section 1 is left to do.

Human dignity is *burdensome to claimants*. Any increase in the elements of section 15 has the undesirable effect of increasing the burden on the claimant. The claimant must establish all elements of section 15. This means that a failure to establish an impairment of human dignity is fatal to the claimant's case, which never advances to section 1. The government must establish all elements of section 1. This means that, if a disadvantage on a listed or analogous ground were enough to constitute discrimination under section 15, it would be for the government to establish an important objective to the challenged law and proportional means of carrying out the objective. This burden is not unreasonable, since government is in a much better position than the claimant to adduce the necessary evidence. But the burden is removed from government if the claimant fails to persuade the Court of an impairment of human dignity. Moreover, the inquiry into human dignity is highly unstructured compared with the section 1 inquiry. In particular, the court does not need to make a finding of minimum impairment (or least drastic means), which under section 1 calls for an inquiry as to whether there are alternative legislative measures that would accomplish the legislative purpose without impairing the right as much.

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[63] *E.g.*, *M. v. H.*, *supra*, note 30; *Lavoie v. Canada*, *supra*, note 22; *Nova Scotia v. Walsh*, *supra*, note 23; *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76.

[64] *Supra*, note 5, at 104. One might add that judges are not well suited to assess affronts to the dignity of persons whose life experience may be very different from their own.

In *Law*, the Court frankly acknowledged that it was imposing a new burden on the claimant, and could only offer in reply[65] that in some cases it would not be necessary for the claimant "to adduce evidence", because it would be "evident on the basis of judicial notice and logical reasoning" that human dignity had been impaired. The fact remains that a failure to persuade the Court (in one fashion or another) that human dignity is impaired causes the claimant to lose the case. As well as *Law* itself, in many subsequent equality cases, the claimant has established a disadvantage based on a listed or analogous ground, but has lost the case for failure to also establish an impairment of human dignity.[66]

X. THE REQUIREMENT OF CORRESPONDENCE

As I explained in the previous s. of this article, in *Law* the Court suggested four "contextual factors" that were to be taken into account in determining whether or not human dignity is impaired by a law that imposes a disadvantage on the basis of a listed or analogous ground. The factor that was dispositive in that case was correspondence between the challenged legislative distinction and the characteristics or circumstances of the claimant. The denial of CPP survivor benefits to spouses under the age of 35 accurately corresponded to the circumstances of younger spouses of deceased income-earners, who could be expected to be more successful in finding and retaining employment than older spouses. Therefore, the claimant, who was denied the spousal benefit on the basis of her age, was unable to establish an impairment of her human dignity and therefore lost her case.

Another age-based case was *Gosselin v. Quebec* (2002),[67] where a workfare program that provided low welfare benefits for persons under 30 unless they attended training programs was upheld. According to the majority, the age-based requirement corresponded to the increased capability of young persons to benefit from training programs. According to the minority, the imposition of hardship on young persons did not

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[65] *Supra*, note 20, at para. 88.

[66] *E.g.*, *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703; *Nova Scotia v. Walsh*, *supra*, note 24; *Gosselin v. Quebec (Attorney General)*, *supra*, note 63; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *supra*, note 63; Ryder *et al.*, *supra*, note 5, at 116-18.

[67] *Supra*, note 63.

respect them as full persons. The majority prevailed, of course, and the claimant, who had subsisted with great difficulty on the low benefits because she had been unable to access the training programs, was unable to establish an impairment of her human dignity and therefore lost her case.

In *Nova Scotia v. Walsh* (2002),[68] the exclusion of common-law spouses from Nova Scotia's community property regime was held, by a divided Court, to correspond to real differences between common-law relationships and legal marriages. In *Canadian Foundation for Children, Youth and the Law v. Canada* (2004),[69] the *Criminal Code*'s permission for parents and teachers to use reasonable corrective force against children was held by a divided Court to correspond to the needs of children. On the other hand, in *Nova Scotia (Workers' Compensation Board) v. Martin* (2003),[70] the Court held unanimously that Nova Scotia's provision of short-term remedial programs, instead of full workers' compensation benefits, for "chronic pain" did not correspond to the needs of injured workers who suffered from that condition.

The correspondence factor has become the key to the impairment of human dignity. From the cases so far, it appears to be the decisive factor in determining whether there is an impairment of human dignity.[71] It is the answer to that factor that yields the outcome, even if the other factors point in the other direction. What are we to make of this? On the one hand, perhaps we should welcome a somewhat more specific test as the proxy for human dignity—although the judges are usually divided on the correspondence test. On the other hand, what does the correspondence factor really mean? Stripped of unnecessary verbiage, I suggest that the correspondence test, as it has been applied by the Court, comes down to an assessment by the Court of the legitimacy of the statutory purpose and the reasonableness of using a listed or analogous ground to accomplish that purpose.[72] If I am right, this leaves very little work for section 1 to do.

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[68] *Supra*, note 24.

[69] *Supra*, note 63.

[70] [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504.

[71] Ryder *et al.*, *supra*, note 5, at 122.

[72] *Id.*, at 122-25, suggest that the correspondence factor is really a reversion for formal equality.

XI. The Role of Section 1 in Equality Cases

Since *Law* imported human dignity into section 15 in 1999, there has been one case in which section 1 has saved a law found to be in breach of section 15.[73] In *Newfoundland (Treasury Board) v. N.A.P.E.* (2004),[74] the Court decided that Newfoundland, faced with a serious financial crisis, could enact a law postponing the implementation of collective agreements under which the government had undertaken to increase the wages of female hospital workers in order to achieve pay equity with men. The Court held that the law withheld a benefit on the basis of a listed ground, namely, sex. The Court also held that it was a breach of human dignity to maintain in force wages that did not do justice to the female workers' contribution. Therefore, there was a breach of section 15. But the Court accepted that in 1991, when the law was enacted, the province had experienced a huge reduction in federal transfer payments, causing the province to make comparable cuts in expenditures, which it did by temporarily freezing the wages of all public sector employees, laying off many employees and not filling vacant positions, closing hospital beds, reducing medicare coverage, and freezing or reducing expenditures for education and other government programs. As part of the response to this fiscal crisis, the postponement of Charter-mandated expenditures was justified under section 1.[75]

The *N.A.P.E.* case is an unusual one. In the great majority of cases, the new element of human dignity in section 15 leaves no role for section 1. It is obviously hard to justify a law that imposes a disadvantage on the basis of a listed or analogous ground and also impairs human dignity.[76] If I am right that human dignity depends on the "correspondence" factor, and if I am right that that the Court uses this factor to decide whether the purpose of the law is legitimate and the use of a listed or analogous ground to accomplish the purpose is reasonable, the close

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[73] In *Lavoie v. Canada*, *supra*, note 22, a majority of the Court upheld citizenship preferences for hiring into the federal public service. Four judges based their decision on s. 1. Two judges based their decision on an absence of impairment of human dignity. Three judges dissented.

[74] [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381.

[75] The Court made no mention of s. 28 of the Charter of Rights, which guarantees rights "equally to male and female persons", and which applies "notwithstanding anything in this Charter". There had been speculation that s. 1 would not apply to sex equality, because of its notwithstanding clause.

[76] This was the view of Bastarache J. (with the agreement of three others) in *Lavoie v. Canada*, *supra*, note 22.

overlap between human dignity and section 1 becomes obvious. Not surprisingly, with the exception of the *N.A.P.E.* case, section 1 has become unimportant in equality cases since the human dignity element was introduced by the Court in 1999. As explained earlier in the article (perhaps ad nauseum), the claimant often loses for failure to establish an impairment of human dignity. Perhaps the same cases would be lost under section 1 too. But at least section 1 is the subject of carefully structured legal tests, and the burden of proving each step of the way rests on government not the claimant.

At a rhetorical level, there is something insulting about telling the unsuccessful equality claimant in a case like *Law* or *Gosselin* or *Walsh* that her human dignity has not been impaired. This is a person who has been disadvantaged by a legislative distinction based on her age or marital status (or some other listed or analogous ground), and who is so upset by her treatment that she has gone to court to challenge the law. Obviously, many equality-seeking claimants are going to lose their cases, and obviously they will be unhappy, but the judicial rhetoric about human dignity makes it look as though they were silly or even neurotic to bother the courts with their problem. Would it not be more compassionate to explain that a disadvantage imposed on the basis of a listed or analogous ground is indeed discrimination in violation of section 15, but this particular law must be upheld because government was able to prove that the law pursued an important purpose, and did so by proportionate means? If we must talk about dignity, I say that is a much more dignified way to lose than to be told that the law from which you suffered never impaired your human dignity.

XII. CONCLUSION

The winding course of judicial interpretation may continue to wind. For all the reasons provided in this paper, I hope it winds away from *Law* and back to *Andrews*. However, all present indications are that *Law* is here to stay, along with its much-maligned requirement of an impairment of human dignity.

The current state of the law on section 15 is that a claimant must show "discrimination", which has the following ingredients:

(1) The challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons;

(2) The disadvantage is based on a ground listed in or analogous to a ground listed in section 15;

(3) The disadvantage also constitutes an impairment of the human dignity of the claimant.

The claimant who persuades the Court of these three elements is entitled to a finding of discrimination, which means that the challenged law is in breach of section 15. The burden then shifts to government to justify the discriminatory law under section 1. For reasons explained in the article, section 1 justification is difficult, because the finding of an impairment of human dignity will involve much of the same inquiry as that required by section 1. However, in unusual cases, section 1 justification will still uphold a discriminatory law.